Supreme Court, U.S.
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No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRONE GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Texas, Fourteenth District

BRIEF OF *AMICI CURIAE* TEXAS LEGISLATORS, REPRESENTATIVE WARREN CHISUM, ET AL., IN SUPPORT OF RESPONDENT

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and Senator Florence Shapiro.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. PETITIONERS HAVE ESTABLISHED NO CONSTITUTIONAL VIOLATION 3

A. The record and law do not support a right of privacy claim 5

1. The record 5

2. The law 6

B. The record and law do not support an equal protection claim 11

II. SECTION 21.06 IS CLEARLY RATIONAL 12

A. Section 21.06 was not the product of animus 12

B. Petitioners attempt to shirk their duty to negate all possible rational bases for § 21.06 by distracting the Court 15

C. Section 21.06 is rationally related to protecting the public health 15

D. Section 21.06 is rationally related to promoting marriage and procreation 17

1. Promoting marriage is important 18

2. Section 21.06 is part of a myriad of state laws promoting marriage and discouraging sexual activity outside of it 20

TABLE OF CONTENTS – Continued

Page

III. JUDICIAL INTERVENTION INTO CONTESTED POLITICAL QUESTIONS DISRUPTS THE PROPER POLITICAL STRUCTURE AND HARMS THE NATION 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Ah Sin v. Wittman, 198 U.S. 500 (1905) 9

Baker v. Wade, 774 F.2d 1285 (5th Cir. 1985) 12

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 4

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 14, 25

Bowers v. Hardwick, 478 U.S. 186 (1986) 8, 10, 11

Caminetti v. United States, 242 U.S. 470 (1917) 7

Carey v. Population Services Int'l, 431 U.S. 678 (1977) 6, 8, 10, 11

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 15

City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996) 18, 23

Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) 7

Dandridge v. Williams, 397 U.S. 471 (1970) 24

Davis v. Beason, 133 U.S. 333 (1890) 7

Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 15

England v. Louisiana Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 4

Eisenstadt v. Baird, 405 U.S. 438 (1972) 7, 10

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) 14

TABLE OF AUTHORITIES – Continued

Page

Fasken v. Fasken, 260 S.W. 701 (Tex. 1924) 22

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 15

Flemming v. Nestor, 363 U.S. 603 (1960) 15

Garcia v. San Antonio Metro., 469 U.S. 528 (1985) 27

Griffith v. Connecticut, 218 U.S. 563 (1910) 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 7, 8, 10

Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) 13

Heller v. Doe, 509 U.S. 312 (1993) 15

Hoke v. United States, 227 U.S. 308 (1913) 6

Holder v. State, 35 Tex. Crim. 19 (1895) 18

International Bd. of Teamsters, Chauffeurs, Warehousemen and Helpers Unions v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) 4

James v. Strange, 407 U.S. 128 (1972) 24

Katzenbach v. McClung, 379 U.S. 294 (1964) 16

L'Hote v. New Orleans, 177 U.S. 587 (1900) 9

Littleton v. Prange, 9 S.W.3d 223 (Tex. App. – San Antonio 1999, *pet. denied*), *cert. denied*, 531 U.S. 872 (2000) 23

Lottery Case, 188 U.S. 321 (1903) 7

Loving v. Virginia, 388 U.S. 1 (1967) 10

Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977) 5

TABLE OF AUTHORITIES – Continued

Page

Ludwig v. State, 931 S.W.2d 239 (Tex. Crim. App. 1996) 22

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 21

Mazique v. Mazique, 742 S.W.2d 805 (Tex. App. – Houston [1st] 1987, no writ) 22, 23

McLaughlin v. Florida, 379 U.S. 184 (1964) 6

Meyer v. Nebraska, 262 U.S. 390 (1923) 8, 10

Miller v. California, 413 U.S. 15 (1973) 9

Minnesota v. Martinson, 256 U.S. 41 (1921) 9

Moore v. Moore, 22 Tex. 237 (1858) 18

Murff v. Murff, 615 S.W.2d 696 (Tex. 1981) 23

Murphy v. California, 225 U.S. 623 (1912) 7

New York v. New Jersey, 256 U.S. 296 (1921) 26

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 6

Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary, 268 U.S. 510 (1925) 8, 10

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 8

Poe v. Ullman, 367 U.S. 497 (1961) 10, 20

Prince v. Massachusetts, 321 U.S. 158 (1944) 10

Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 15

Reynolds v. United States, 98 U.S. 145 (1879) 9

Roberts v. Roberts, 192 S.W.2d 774 (Tex. 1946) 18

Roe v. Wade, 410 U.S. 113 (1973) 8, 10

Romer v. Evans, 517 U.S. 620 (1996) 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

Roschen v. Ward, 279 U.S. 337 (1929) 24

Schlueter v. Schlueter, 975 S.W.2d 584 (Tex. 1998) 22

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 10

Sosna v. Iowa, 419 U.S. 393 (1975) 25

Southern Surety Co. v. Oklahoma, 241 U.S. 582 (1916) 6

State v. Smith, 766 So.2d 501 (La. 2000) 28

Texas Employers Insurance Association v. Elder, 282 S.W.2d 371 (Tex. 1955) 18

Torme v. State, 525 S.W.2d 9 (1975) 6

Townsend v. Sain, 372 U.S. 293 (1963) 4

Troxel v. Granville, 530 U.S. 57 (2000) 8

United States v. Salerno, 481 U.S. 739 (1987) 5, 6, 12

United States v. Lopez, 514 U.S. 549 (1995) 16

Vacco v. Quill, 521 U.S. 793 (1997) 9

Waldrop v. State, 41 Tex. Crim. 194 (1899) 18

Washington v. Glucksberg, 521 U.S. 702 (1997) 7, 9

Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978) 21

Young v. Young, 609 S.W.2d 758 (Tex. 1980) 23

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 26

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TEX. FAM. CODE § 1.101 18

TEX. FAM. CODE § 2.001 ..... 20, 23

TEX. FAM. CODE § 2.003 23

TEX. FAM. CODE § 2.501 21

TEX. FAM. CODE § 3.002 21

TEX. FAM. CODE § 3.102 22

TEX. FAM. CODE § 6.003 23

TEX. FAM. CODE § 6.201 23

TEX. FAM. CODE § 6.202 23

TEX. HEALTH & SAFETY CODE § 85.007 ..... 16, 21

TEX. PENAL CODE § 12.47 14

TEX. PENAL CODE § 21.06 ..... *passim*

TEX. PENAL CODE § 21.11 23

TEX. PENAL CODE § 25.01 23

TEX. PENAL CODE § 25.02 23

TEX. PROB. CODE § 43 21

TEX. PENAL CODE § 43.02 23

TEX. PENAL. CODE § 43.21 23

TEX. PROB. CODE § 45 21

TEX. R. EVID. 504 22

TEX. R. EVID. 504(a) 22

TEX. R. EVID. 504(b) 22

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

Catherine E. Ross & Chloe E. Bird, *Sex, Stratification and Health Lifestyle: Consequences for Men's and Women's Perceived Health*, 35 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 161-78 (1994) 19

CDC Basic Statistics, Division of HIV/AIDS Prevention.....16, 17

Corey L. M. Keyes, *The Mental Health Continuum: From Languishing to Flourishing Life*, 43 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 207-22 (2002).....18

Elizabeth H. Gorman, *Bringing Home the Bacon: Marital Allocation of Income-Earned Responsibility, Job shifts, and Men's Wages*, 61 JOURNAL OF MARRIAGE AND THE FAMILY, 110-22 (1999).....19

Health Consequences of Marriage for the Retirement Years, 21 JOURNAL OF FAMILY ISSUES No. 5, 559-86 (July, 2000) 19

House Bill 587, codified at TEX. PENAL CODE. § 12.47 14

Legislative Research Library of Texas, *Researching Legislative History and Intent, Step 4: Listen to tape recordings of legislative discussion.* <www.lrl.state.tx.us/legis/intent/intentStep4.html> 13

P. M. Prior & B. C. Hayes, *Marital Status and Bed Occupancy in Health and Social Care Facilities in the United Kingdom*, 115 PUBLIC HEALTH, 401-06 (2001).....18

Samuel Adams, Letter to Richard Henry Lee, 3 Dec. 1787, in The Writings of Samuel Adams 4:324 (Harry A. Cushing ed. 1968) 27

TABLE OF AUTHORITIES – Continued

Page

Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods Individual, Community, and Metropolitan Influences*, 102 AMERICAN JOURNAL OF SOCIOLOGY, 1040-84 (1997).....19

Texas HIV/STD Annual Report 2001, 9 (Texas Dept. of Health Bureau of HIV & STD).....16

THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Cooke ed., 1961) 26

INTEREST OF *AMICI CURIAE*[1]

Amici are Texas Senators and Representatives who represent the people of Texas. *Amici* believe this case is about the right of the people and their duly elected representatives to determine State policy regarding marriage, the family and sexual conduct outside of marriage. The variety of State laws and policies on this contentious issue, and the changing nature of these laws within the States is a sign of the health of our democratic republic.

Petitioners ask the Court to take this issue out of the public debate and discussion and determine for all States a deeply controversial public policy issue found nowhere in the Constitution. *Amici* believe this would be a serious mistake and would have implications far broader than the statute in this case. Because of *Amici*'s more complete understanding of the Texas laws and legislative history and *Amici*'s understanding of additional State interests to support the challenged law, *Amici* believe their brief will be of assistance to the Court.

SUMMARY OF ARGUMENT

There is no evidence in the record to support petitioners' claims. There is no evidence as to whether the anal sex was non-consensual or consensual, private or in front of

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation and submission of this brief.

others, for pay or not, or by people too close in relation (incest). There is also no record of the sexual orientation of either of the men. The Court is being asked to issue an opinion based on hypothetical facts. Both claims should be dismissed as improvidently granted.

Petitioners seek a new "right of privacy" in sexual behavior, not the traditional right grounded in rights of marriage and procreation. There is no natural limitation to the new expansive right sought by petitioners. It is not deeply rooted in the nation's traditions and history and should be rejected.

Petitioners and their *amici* attempt to attach a badge of hatred to the Texas Legislature. Despite hours and hours of tapes of the hearings and testimony on TEX. PENAL CODE § 21.06 in the 1973 session and many subsequent sessions as well, not one single source of corroborating evidence from the vast legislative record is offered. Indeed, there are numerous rational bases supporting § 21.06, including the protection of public health and the promotion of marriage and procreation.

The act of homosexual sodomy reaps tremendous public health consequences, much more than heterosexual sodomy. Texas is certainly rational in attempting to discourage conduct leading to a lopsided proportion of the harm. Texas is also rational in promoting marriage and procreation and discouraging sexual conduct outside of marriage. Texas has a myriad of laws favoring marriage and discouraging sexual activity outside of marriage. Section 21.06 is one part of a system of laws including laws disfavoring adultery, banning polygamy and sex education requirements that sex outside of marriage, including homosexual sodomy, be discouraged. Promoting marriage and encouraging and funneling sexual activities

to within its bonds meets rational basis. Each of the arguments of petitioners, if accepted, would have serious implications for the marriage laws of every State.

Decisions regarding marriage, the family and appropriate sexual behavior should be left to the States, as they have been for over 200 years. The Court is being asked to inject itself into the middle of a fractious political debate, which petitioners themselves concede is changing in their favor in State after State. Taking the issue out of the public debate and discussion and determining for all States a deeply controversial public policy issue would be a serious mistake and would harm the Court and this nation.

ARGUMENT

I. PETITIONERS HAVE ESTABLISHED NO CONSTITUTIONAL VIOLATION.

Petitioners' entire case rests on the argument that consensual, private, non-commercial sex is protected by the Constitution and that petitioners were discriminated against because they are homosexuals. Yet, there is absolutely no record of any of the facts alleged by petitioners and their *amici*, save the following: two adult males – a 55-year-old white male (John Lawrence) and a 31-year-old black male (Tryon Garner) were found by police officers in the act of anal sodomy inside the apartment where Lawrence resides. Pet. App. 129a, 141a. The two probable cause affidavits, both authored by Officer Quinn, the only source of facts for the record in this case, read as follows:

> Officers dispatched to 794 Normandy #833 reference to a weapons disturbance. The reportee

> advised dispatch that a black male was going crazy in the apartment and he was armed with a gun.
>
> Officers met with the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

There is no evidence in the record that the anal intercourse was consensual, no evidence that it was non-commercial, no evidence of their degree of relation (incest) and no evidence that it was not done in the presence of other people. There is also no record of the sexual orientation of the men.

The dearth of facts in the record is especially troubling considering that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Disputed factual issues drive constitutional decisions. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n. 5 (1986) ("[w]e have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication."). Factual records are essential to constitutional deliberation. *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"). The lack of a factual record to support petitioners' claims is of great significance. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 2477 (2002) (O'Connor concurring) ("there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program"); *International Bd. of Teamsters, Chauffeurs, Warehousemen*

and Helpers Unions v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to decide the Constitutional issues involved."). Without a factual record supporting petitioners' claims, this Court would be forced to render an advisory opinion in a vacuum. The case should be dismissed as improvidently granted.

A. The record and law do not support a right of privacy claim.

1. The record.

Petitioners refer to "adults' private, consensual choices." Petitioners Brief at 9, *Lawrence* (No. 02-102). There is no record, however, that petitioners' sexual activity was done in private. It could have been done in front of other people. *See Lovisi v. Slayton*, 539 F.2d 349, 351-52 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977) (even marital right of privacy is waived when an onlooker is welcomed). Petitioners also may have desired to be caught in order to create standing to challenge § 21.06.[2] Petitioners, in light of the absence of any facts in the record to support their claims, may only make a facial challenge. Under *United States v. Salerno*, a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be

[2] It is rare indeed for an "anonymous" caller making a false report to conveniently wait for the police to show them directly to the room where the anal sex was occurring, knowing his identity and the false report would be discovered. These facts strongly suggest that the men engaging in anal sex desired to be "caught" by the police for the very purpose of challenging this law. It appears that petitioners' privacy argument lacks factual merit.

valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners cannot meet this burden. For example, § 21.06 applies to non-consensual sodomy. *See, e.g., Torme v. State*, 525 S.W.2d 9 (1975). Would non-consensual sodomy be protected as a "right of privacy" of the perpetrator? Of course not. Likewise, the conduct could have been for pay, incestuous or in front of others. These applications of the law would make it constitutional under the *Salerno* standard. With such a sparse record, this case was either improvidently granted or should be summarily affirmed.

2. The law.

Additionally, even if a record had existed, the right of privacy is not absolute. States are not completely prohibited from regulating some aspects of intimate relationships. *See Carey v. Population Services Int'l*, 431 U.S. 678, 689 n. 5 (1977) ("we do not hold that State regulation must meet this standard 'whenever it implicates sexual freedom,' . . . or 'affect[s] adult sexual relations' "); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973) ("but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond State regulation, is a step we are unable to take"). As this Court noted in *Paris Adult Theatre I*, "State statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' " *Id.* at 69 n. 15.[3] Bigamy involves consenting adults, intimate

[3] ("Consider also the language of this Court in *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), as to adultery; *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) as to fornication; *Hoke v. United*

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sexual relationships and privacy of the home, yet States are free to outlaw the practice. *See Davis v. Beason*, 133 U.S. 333, 344-45 (1890). If bodily integrity, intimate personal decisions and adult consent were ever wrapped up into a single right, it would be the right for a person to choose to end their own life. *See Compassion in Dying v. Washington*, 79 F.3d 790, 813-814 (9th Cir. 1996) ("Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy' "). Yet this Court specifically refused to acknowledge a fundamental right to die. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). There is, very simply, no fundamental right to engage in homosexual sodomy deeply rooted in our nation's traditions and history.

Petitioners attempt to wrap their claims in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Petitioners correctly quote *Eisenstadt* for the proposition that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person." *Eisenstadt*, 405 U.S. at 453; Petitioners' Brief at 12, *Lawrence* (02-102). However, petitioners fail to complete the quotation by including "as the decision whether to bear or beget a child." *Id.* The cases relied on by petitioners to support their "right of privacy" argument

States, 227 U.S. 308, 320-322 (1913), and *Caminetti v. United States*, 242 U.S. 470, 484-487, 491-492 (1917), as to 'white slavery;' *Murphy v. California*, 225 U.S. 623, 629 (1912), as to billiard halls; and the *Lottery Case*, 188 U.S. 321, 355-356 (1903), as to gambling").

revolve around a common theme of decisions regarding marriage, raising children and procreation. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000) ("fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (decisions regarding childbearing); *Carey*, 431 U.S. 678 (1977) (decisions regarding childbearing); *Roe v. Wade*, 410 U.S. 113 (1973) (decisions regarding childbearing); *Griswold*, 381 U.S. 479 (decisions regarding procreation within marital relationship); *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925) (decisions regarding the upbringing and raising of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (decisions regarding the upbringing and education of children). There is a certain cohesion among the decisions of this Court that compel petitioners to show something more than just an asserted right to do as one wishes.

Petitioners cite these cases while inviting the Court to ignore their holdings. Decisions regarding marriage and procreation receive special protection from this Court. Other individual choices among consenting adults do not, and it is no legal reason to change this law because petitioners theorize one generation is obtuse while the next becomes enlightened. Therefore, the decisions petitioners rely on should not be read in a vacuum but should be understood for what they really are; they represent not "a series of isolated points," but rather a group of rights protecting the rights of couples, whether married or unmarried, to choose when and how they will raise children, which is the most important decision for any society. *Casey*, 505 U.S. at 848.

There is precedent, of course, for a State to constitutionally criminalize private, consensual sodomy. *See Bowers*, 478 U.S. 186. Other examples of private, consensual, adult

activity that the State may prohibit include polygamy, bigamy, polyandry, the dissemination of obscene materials to willing buyers, the sale and possession of drugs, prostitution, gambling, suicide (including aiding another with suicide), and usury. *Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion"); *Miller v. California*, 413 U.S. 15, 18-19 (1973) ("[t]his Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material"); *Minnesota v. Martinson*, 256 U.S. 41, 45 (1921) ("[t]here can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs"); *L'Hote v. New Orleans*, 177 U.S. 587 (1900) (prostitution); *Ah Sin v. Wittman*, 198 U.S. 500, 505-506 (1905) ("suppression of gambling is concededly within the police powers of a State"); *Glucksberg*, 521 U.S. 702 (1997) (upholding Washington's anti-assisted suicide statute); *Vacco v. Quill*, 521 U.S. 793 (1997) (upholding New York's anti-assisted suicide statute); *Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) ("It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a State for the use of money loaned within the jurisdiction of the State is one within the police power of such State.").

Petitioners ask this Court to overturn precedent and declare a new right never before recognized by this Court. This new "right" to sexual gratification would have no natural or principled limitation.

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but

> the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power to either forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Regulating the intimacy of the marital relationship and decisions regarding having and raising children "is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection." *Id.*

Petitioners come to this Court citing the same cases citied by the respondent in *Bowers v. Hardwick*.[4] The

[4] *Bowers*, 478 U.S. at 190 ("We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut, supra,* and *Eisenstadt v. Baird, supra,* with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process

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Court rejected the pertinence of those cases, holding "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Bowers*, 478 U.S. at 190-91. The only new argument Petitioners offer the Court is the perceived change in the prevailing winds of sentiment regarding homosexual activity among the various States. Petitioners are asking this Court to impose the will of the majority of States upon the minority, which is exactly what they complain of in this case.

B. The record and law do not support an equal protection claim.

Petitioners' equal protection claim is not supported in the record. There is no record that these two men were homosexuals. Without a record that the petitioners were homosexuals, they cannot fashion an equal protection claim that they are within the class they claim is discriminated against by § 21.06. Thus, they cannot support either a facial or an as-applied challenge. However, even if a facial challenge analysis were applied, § 21.06 applies whenever two members of the same sex, whether homosexual, heterosexual or bisexual, engage in "deviate sexual intercourse." Section 21.06, applied to two heterosexual men who engage in a one-time excursion into "deviate sexual intercourse" for experimentation purposes, does not discriminate against homosexuals. Petitioners simply have no record to back an equal protection claim and could not

Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International, supra*, at 688-689").

meet the *Salerno* standard even if a claim existed. *See generally Salerno*, 481 U.S. 739.

Additionally, Petitioners' equal protection argument fails because "the statute is directed at certain conduct, not at a class of people." *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985). Section 21.06 applies to individuals whether they are black or white, Asian or Hispanic, male or female, old or young. The law applies with equal application whether the individual is homosexual or heterosexual or bisexual or shifts between such categories from time to time. The law knows neither race nor sexual orientation.

Even if a valid equal protection claim had been brought, this case is not about a protected class such as race or gender. Sexual orientation is not a suspect class. *See Romer*, 517 U.S. at 632. The rational basis test applies, and § 21.06 easily satisfies rational basis.

II. SECTION 21.06 IS CLEARLY RATIONAL.

Section 21.06 easily satisfies the rational basis test. There are many rational bases supporting § 21.06. Interests in public health or the promotion of marriage would each alone satisfy the rational basis test.

A. Section 21.06 was not the product of animus.

Petitioners and *amici* supporting petitioners offer that the "***obvious*** explanation for § 21.06 is that it reflects popular disapproval of gay people." Brief of *Amici Curiae* Bruce A. Ackerman, et al. at 21, Lawrence v. Texas (No. 02-102) (emphasis added). This accusation is repeated throughout the *amici* supporting petitioners. Petitioners equate the motive for enacting § 21.06 to that of men who

"feared witches and burnt women." Petitioners' Brief at 37, *Lawrence* (No. 02-102). These accusations are outrageous. These charges are made, notwithstanding the availability of legislative history regarding the enactment of § 21.06 in the form of audiotapes of legislative committee hearings and debates. *See* Legislative Research Library of Texas, *Researching Legislative History and Intent, Step 4: Listen to tape recordings of legislative discussion.* <www.lrl.state.tx.us/legis/intent/intentStep4.html> (noting that recordings are available for legislation from 1973 onward). Petitioners' failure to cite this legislative history is telling.[5] Neither Respondent nor *Amici* can be expected to offer evidence to dispute a negative, especially one that does not exist. Petitioners' "purposeful avoidance of the truth" cannot serve as the justification for pinning a badge of hatred on the members of the Texas Legislature. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 692 (1989).

Petitioners' unsubstantiated claims of hatred by members of the Texas legislature are undoubtedly an attempt by petitioners to connect to dicta in this Court's opinion in *Romer v. Evans*, 517 U.S. 620, 632 (1996) in which Justice Kennedy in striking down a Colorado Amendment that limited the political access of gay and lesbian citizens to local government in Colorado observed, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."

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[5] Hours and hours of tapes of hearings and testimony on § 21.06 in the 1973 and subsequent legislative sessions exist and establish the legislative record. Petitioners have never introduced any of these tapes into the record or relied upon any of this vast legislative history.

Section 21.06, however, is clearly distinguishable. Unlike the Colorado amendment that struck at the very heart of the political process and therefore limited the ability of those subject to its terms to seek its repeal or reform, Petitioners like all Texas citizens remain free to argue for political change of the law. *Cf. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (amendment of city charter permissible under *Romer*). In fact, as Petitioners assert, some Texas citizens have sought repeal of this law. The fact that they have not won the political contest at this point in time does not make the law unconstitutional, nor evidence that the legislature is motivated by animus.

The fluid nature of political contests is well known to this Court. It is evidenced in the particular context relevant to this case by the passage of a hate crimes bill in the last session of the Texas Legislature that included "sexual preference" among the characteristics that invoked increased punishment. *See* House Bill 587, codified at TEX. PENAL CODE § 12.47.

Petitioners and their *amici* invite the Court to find animus on the part of the Texas Legislature as the necessary precursor to finding no rational reason for § 21.06 to exist. As Justice Kennedy pointed out, "[i]t is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws." *Board of Trustees v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). In this case, it is a charge made with no offer of evidence. More importantly, it is made with no foundation in truth.

B. Petitioners attempt to shirk their duty to negate all possible rational bases for § 21.06 by distracting the Court.

Petitioners are using the wrong standard. Under the rational basis test, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (*quoting Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Although there is no evidence that § 21.06 constitutes a legislative classification of persons, as opposed to acts, the rational basis test merely requires that such a classification be "rationally related to a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Petitioners bear the burden "to negative every conceivable basis which might support" § 21.06 "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (internal citation omitted). The State of Texas "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320; *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

Both the protection of public health and the promotion of marriage serve as rational bases to support § 21.06.

C. Section 21.06 is rationally related to protecting the public health.

Texas may legitimately exercise its police powers to protect the public health. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) ("Erie's efforts to protect public health and safety are clearly within the city's police

powers"). One of the rational bases for enacting § 21.06 was to protect the public health from the very real danger of same-sex sodomy.[6] Legislators are especially concerned for the health, safety and well-being of those who may seek to engage in same-sex sodomy. As *Amici* Texas Physicians Resource Council, et al. in their brief pointed out, "men who have sex with men, perhaps 2 percent of the U.S. population (*supra* note 12), account for 60 percent of Texas men with HIV/AIDS, 63 percent of the cumulative number of AIDS cases in U.S. men, and over 51 percent of all U.S. AIDS cases." Brief of *Amici Curiae* Texas Physicians Resource Council, et al. at 26, Lawrence v. Texas (No. 02-102); *See Texas HIV/STD Annual Report 2001*, 9 (Texas Dept. of Health Bureau of HIV & STD);[7] *CDC Basic Statistics*, Division of HIV/AIDS Prevention.[8]

Same-sex sodomy presents serious health problems that must be prevented in order to ensure that all of the people of the State of Texas, especially those that seek to engage in same-sex sodomy, are fully protected from ravages of infection and disease. According to the National

[6] Arguments that there is no legislative statement that § 21.06 was for the purpose of protecting public health misunderstand the law. There is no need for the Texas Legislature to produce legislative proclamations of intent and purpose. *See United States v. Lopez*, 514 U.S. 549, 617 (1995) (Breyer, J., dissenting) ("the matter that we review independently (*i.e.*, whether there is a 'rational basis') already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway."); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) ("no formal findings were made, which of course are not necessary"). In actuality, however, the Legislature has expressed the connection between § 21.06 and protection of public health. *See* TEX. HEALTH & SAFETY CODE § 85.007 (2002).

[7] Available at www.tdh.state.tx.us/hivstd/legislature/2001.pdf.

[8] Available at www.cdc.gov/hiv/stats.htm.

Center for HIV, STD and TB Prevention of the Centers for Disease Control and Prevention (CDC), Texas ranks fourth in the nation for the number of cumulative AIDS cases with 56,730 cases. *See CDC Basic Statistics*. With 368,971 AIDS cases being the direct result of same-sex sodomy between men and only 32,735 AIDS cases being the direct result of heterosexual contact, there is no doubt that it is rational to ban same-sex sodomy. *See id.* Same-sex sodomy accounts for more than ten times the amount of AIDS infections than opposite-sex activity. And this is just one sexually transmitted disease. The interests presented above alone, in addition to those presented by *Amici Curiae* Texas Physicians Resource Council, et al., more than meet the requirements for § 21.06 to be rational.

D. Section 21.06 is rationally related to promoting marriage and procreation.

Section 21.06 also satisfies rational basis as part of a myriad of laws enacted by the Texas Legislature to encourage marriage and discourage sexual activity outside of marriage. Second, even if § 21.06 were considered apart from all other Texas laws, it still serves the same interest of promoting marriage since the only sodomy prohibited is that which cannot be within and can never lead to marriage. Third, even if § 21.06 did not perfectly track the marital/non-marital distinction, it is not necessary to do so to pass the rational basis test. Finally, petitioners' arguments of discrimination would apply equally to heterosexual marriage, rendering the marriage laws of all fifty States unconstitutional.

1. Promoting marriage is important

The promotion of marriage is important to Texas. The Texas Legislature, expressing itself through the Family Code, stated that it created the statutory rules to establish marriage in order "to promote the public health and welfare and to provide the necessary records." TEX. FAM. CODE § 1.101. The highest courts[9] in Texas have likewise long affirmed that Texas has a public policy favoring marriage. *City of Sherman v. Henry*, 928 S.W.2d 464, 470 (Tex. 1996); *Texas Employers Insurance Association v. Elder*, 282 S.W.2d 371, 373 (Tex. 1955); *Roberts v. Roberts*, 192 S.W.2d 774, 776 (Tex. 1946); *Moore v. Moore*, 22 Tex. 237, 238-40 (1858); *Waldrop v. State*, 41 Tex. Crim. 194, 198 (1899); *Holder v. State*, 35 Tex. Crim. 19, 24 (1895).

The Texas Legislature promotes marriage because it provides numerous benefits to the State and its people. Married individuals are more likely than unmarried individuals to enjoy "very good" or "excellent" mental and emotional health. *See* Corey L. M. Keyes, *The Mental Health Continuum: From Languishing to Flourishing Life*, 43 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 207-22 (2002). In one study done over a period of thirty years, marriage had a substantial effect on the overall physical health of the population, which led to a direct and measurable benefit of reduced use of health facilities. *See* P. M. Prior & B. C. Hayes, *Marital Status and Bed Occupancy in Health and Social Care Facilities in the United Kingdom*, 115 PUBLIC HEALTH, 401-06 (2001). Married individuals

[9] Texas has two equal but parallel high courts. The Texas Supreme Court is the highest state court of appeal for civil matters. The Texas Court of Criminal Appeals is the highest state court of appeals for criminal matters.

have better health in all categories of health across the board. *See* Amy Mehraban Pienta, Mark D. Hayward & Kristi Rahrig Jenkins, *Health Consequences of Marriage for the Retirement Years*, 21 JOURNAL OF FAMILY ISSUES No. 5, 559-86 (July, 2000). Thus, marriage has a significant impact on the cost of health care and health related services. These savings translate into lower health insurance premiums, making health care available to those that could not otherwise afford health insurance and enabling the State of Texas to provide for the medical care of the poor.

Marriage creates more stability in the work force as married men are less likely to be terminated involuntarily or leave a job without having another job in hand. *See* Elizabeth H. Gorman, *Bringing Home the Bacon: Marital Allocation of Income-Earned Responsibility, Job Shifts, and Men's Wages*, 61 JOURNAL OF MARRIAGE AND THE FAMILY, 110-22 (1999). In fact, becoming married almost doubles the probability of moving from a poor to a non-poor neighborhood. *See* Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AMERICAN JOURNAL OF SOCIOLOGY, 1040-84 (1997) (The study looked at thirty years of data from 17,000 inner-city households). There is a direct link between marriage and economic prosperity. Promoting marriage is important to the overall fight to end poverty. Marriage is a component to increasing economic prosperity, which in turn leads to an increase in overall health. *See* Catherine E. Ross & Chloe E. Bird, *Sex, Stratification and Health Lifestyle: Consequences for Men's and Women's Perceived Health*, 35 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 161-78 (1994). Promoting marriage impacts so many other aspects of social well-being that its benefits cannot be denied. It is, therefore, imperative that the Texas Legislature be free to promote marriage and

discourage sexual activity outside of marriage so that the Legislature may maintain its strongest weapon against poverty and deteriorating health.

2. Section 21.06 is part of a myriad of state laws promoting marriage and discouraging sexual activity outside of it.

In evaluating whether § 21.06 is rational, the Court should consider that the provision is one part of a larger network of laws designed to further the legitimate State interest of promoting traditional marriage of one man and one woman.

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Poe, 367 U.S. at 546 (Harlan, J., dissenting). The connection between § 21.06 and marriage is undeniable. **The same legislature which changed the Texas sodomy law in 1973 to its current form, at the same time changed Texas' marriage law to *explicitly* specify, for the first time, that marriage in Texas may only be between "a man and a woman."** TEX. FAM. CODE § 2.001 (Acts 1973, 63rd Leg., p. 1596, ch. 577, § 1). Even in teaching sexual education, Texas law emphasizes that sex should be within marriage and other conduct, such as homosexual sex, is discouraged. Sex education materials must "emphasize sexual abstinence before marriage and

fidelity in marriage as the expected standard" and must discourage "homosexual conduct" and note that it violates § 21.06. TEX. HEALTH & SAFETY CODE § 85.007.

Texas provides benefits to married couples that it does not provide to other "couples." Spouses have the right to consortium, the right to "affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage." *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978). Spouses may sue third parties in tort for the negligent or intentional impairment (such as through death or personal injury) of second spouse's consortium. *Id.* Spouses also have rights to support from one another. TEX. FAM. CODE § 2.501. A spouse who breaches this duty can be liable to third parties for necessaries purchased by the wronged spouse. *Id.* Spouses likewise have mutual rights to "services," meaning the performance by a spouse of household and domestic duties. *Whittlesey*, 572 S.W.2d at 666 n. 3. A spouse can recover in tort against a third party for the impairment (such as through death or personal injury) of the second spouse's ability to perform services. *Id.*

Another benefit of marriage not provided to other "couples" involves special property rights. Texas is a community property State. TEX. FAM. CODE § 3.002. Texas views the partners to a marriage as a community. Property acquired from the labor of either spouse during the marriage is generally viewed as property of the community, not the individual spouse. If a spouse dies intestate, the surviving spouse inherits at least some, and perhaps all (depending on whether other survivors exist), of the decedent's interests in community and separate property. TEX. PROBATE CODE §§ 43 and 45. Both spouses have right to joint management and control of ordinary community

property. TEX. FAM. CODE § 3.102. A spouse who controls special community property (community property under the sole control of one spouse) owes fiduciary duties to the other spouse to use the property for the benefit of the community. *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex. 1998); *Mazique v. Mazique*, 742 S.W.2d 805, 807-08 (Tex. App. – Houston [1st] 1987, no writ). Unmarried "couples" do not have access to this community property system. Texas does not recognize a community in other relationships.

Texas has also created a zone of privacy within marriage that does not apply to other intimate relationships. For example, the Texas Rules of Evidence provide evidentiary privileges to spouses. TEX. RULES OF EVID. 504. One privilege permits spouses to refuse to disclose confidential communications from the second spouse. TEX. R. EVID. 504(a). A second and broader privilege permits a spouse immunity from testifying against the second spouse in a criminal case – whether about confidential communications or otherwise. TEX. R. EVID. 504(b). The Texas Supreme Court has explained that these privileges are "to promote and encourage the utmost confidence between husband and wife and thus to aid in the preservation of the marriage status." *Fasken v. Fasken*, 260 S.W. 701, 703 (Tex. 1924); *see also Ludwig v. State*, 931 S.W.2d 239, 242-43 (Tex. Crim. App. 1996). The policy of the law in Texas favors marriage and not other sexual behavior, however intimate or long-standing.

Texas also encourages marriage[10] by prohibiting or penalizing extra-marital sexual conduct. Some private, consensual sexual acts are criminal. *See* TEX. PENAL CODE §§ 25.01, 25.02, 21.06 and 43.02. In addition to criminalizing some sexual conduct, Texas legally penalizes other extra-marital sexual acts. Adultery, for example, while not criminal, is a ground that makes the adulterer at fault for divorce. TEX. FAM. CODE § 6.003. Even though Texas does allow no-fault divorces, Texas provides that a finding of fault is relevant to dividing the marital estate. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758 (Tex. 1980). The trier of fact may rightly reduce the award of the party at fault. Similarly, Texas recognizes that when a spouse uses community property to fund adulterous affairs, the second spouse has a claim for fraud on the community, which affects the division of the estate in favor of the wronged spouse. *Mazique*, 742 S.W.2d at 807-808.

Even the Texas Constitution and common law support the legislative goal of funneling sexual activity into the bonds of marriage and disfavoring sex outside of marriage. In *City of Sherman v. Henry*, 928 S.W.2d 464, 470 (Tex. 1998), the Texas Supreme Court refused to extend the

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[10] Texas law limits marriage to one man and one woman. TEX. FAM. CODE § 2.001; *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. – San Antonio 1999, pet. denied), *cert. denied*, 531 U.S. 872 (2000). To enforce this arrangement, Texas does not legally recognize other arrangements (some of which may be recognized in other countries or jurisdictions), such as polygamy, incest, polyandry, bigamy, homosexual unions, and marriages of parties under the age of 14. TEX. FAM. CODE §§ 2.001, 2.003, 6.201 and 6.202. These non-traditional marital structures are so disfavored that many bring criminal liability. TEX. PENAL CODE §§ 21.11, 25.01, 25.02 and 43.21.

State right of privacy to sexual conduct outside of marriage, even though other jurisdictions had done so. Texas law thus recognizes sex within marriage as a special protected status, while disfavoring sex outside of marriage.

The argument that § 21.06 treats homosexual and heterosexual sodomy differently misses the mark. Whether viewing the Texas law against polygamy, sex education requirements that sex outside of marriage be discouraged, laws disfavoring adultery, or the prohibition of § 21.06, all these laws serve the interest of promoting marriage and discouraging sex outside of it.[11]

Even if § 21.06 were divorced from the other Texas law and viewed in a myopic fashion, it would still serve the same interest. Section 21.06 specifically prohibits the only sodomy which cannot be within and can never lead to marriage. Additionally, "a statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).[12] Promoting marriage and encouraging

[11] Petitioners' heterosexual/homosexual discrimination argument, if accepted, would equally strike down Texas laws discouraging adultery, since only those in heterosexual relationships are adversely affected.

[12] Moreover, under the rational basis test, "a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (*per curiam*) (*quoting Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). This Court has chosen "not [to] inquire whether [a] statute is wise or desirable.... Misguided laws may nonetheless be constitutional." *James v. Strange*, 407 U.S. 128, 133 (1972). The obvious reason for such a position by the Court is that

(Continued on following page)

and funneling sexual activities to within its bonds, easily satisfy the rational basis requirement.

The arguments of petitioners – (1) that a law which states a man and woman can engage in activity that a man and man cannot is discriminatory and unconstitutional, and (2) that fundamental rights status attaches to homosexual sodomy – directly implicate marriage. If (1) is true, the marriage laws of every State also so discriminate. If (2) is true, each State would be required to justify, under strict scrutiny, all its laws favoring heterosexual marriage. Such a determination would even implicate federal laws and regulations from the Department of Defense's "don't ask, don't tell" to Social Security and immigration laws and all other federal and State laws that assume a basic definition of marriage as heterosexual.

It is wise to leave the core area of the family to the States. As this Court has stated, "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Decisions regarding marriage, the family and appropriate sexual behavior should at least be the subject of public debate and discourse, as it has for the past 200 years, decided by duly elected bodies, and the 281,421,906 Americans they represent, not decided behind closed doors by courts.

"[r]ational-basis review – with its presumptions favoring constitutionality – is a paradigm of *judicial* restraint." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S 356, 383 (2001) (Breyer, J., dissenting) (internal citation omitted) (emphasis in original).

III. JUDICIAL INTERVENTION INTO CONTESTED POLITICAL QUESTIONS DISRUPTS THE PROPER POLITICAL STRUCTURE AND HARMS THE NATION.

The Constitution embodies a delicately balanced power structure, both horizontally and vertically. Horizontally, the separation of powers confers on each branch the means "to resist encroachments of the others." THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Cooke ed., 1961). Vertically, principles of federalism require special attention when the Court is put in the position of piercing the silence of the record with its own "findings of fact," especially when those "facts" can be based only on the bare assertions of petitioners and their *amici* without support in the record. A factual record, missing in this case, is essential.

Petitioners rely heavily on the fact that many States have repealed their sodomy and fornication laws. *See* Petitioners' Brief at 24, *Lawrence* (No. 02-102). According to petitioners, the Texas legislature is out of step with the legislatures of other States and must be forced by this Court to bend to the will of the majority of States. This is akin to asking the Court to control the conduct of one State at the behest of another. *See New York v. New Jersey*, 256 U.S. 296 (1921) (the Court at least required clear and convincing evidence before exercising its power to control the conduct of one State at the behest of another in an effort to promote federalism); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("The Framers, however, did not make the judiciary the overseer of our government").

This case has vast and far-reaching implications that go beyond the decision regarding the present case. A

decision in favor of petitioners will bring into question the ability of the states to regulate sexual conduct and define marriage as the union of one man and one woman. Such a decision would arguably affect our communal lives more than any other issue the States will face in the foreseeable future. It will also "invite [ ] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy."[13] *Garcia*, supra, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted).

The Louisiana Supreme Court, confronted with the constitutionality of its sodomy law, issued a warning concerning judicial restraint:

> [O]ur constitution is not [to] be subject to judicial amendment to express whatever a majority of this court happens to conclude at any given time is the more enlightened viewpoint on a particular controversial issue. If our constitution can be judicially amended in such a manner, that constitutes government by this court, rather than government through a constitutional system of which this court is a separate and equal branch. To hold otherwise would be to allow any and all

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[13] "If the several States in the Union are to become one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Samuel Adams, Letter to Richard Henry Lee, 3 Dec. 1787, in The Writings of Samuel Adams 4:324 (Harry A. Cushing ed. 1968).

> disaffected groups . . . [to] only convince a majority of this court that what they seek is an implicit "right" afforded by the Louisiana Constitution. Our constitution wisely provides for separation of powers, and authorizes the legislature to make public policy determinations in this area.

State v. Smith, 766 So.2d 501, 510 (La. 2000).

Petitioners point out that some States have chosen to change their laws through the appropriate legislative process. Petitioners' attempt to accelerate their victories by having this Court impose the decisions of some States on the other States would destroy the debates and democratic discussions occurring State by State. It would do damage to our country's structure and misuse the role and power of the courts.

> Therefore, the only perceptible unconstitutionality in this case is that which would be evident if this court would determine, by acting as social engineers rather than jurists, and elevate our own personal notions of individual "liberty" over the collective wisdom of the voters' elected representatives' belief. That belief has already determined that a prescription on oral and anal sex, consensual or otherwise, is in furtherance of the moral welfare of the public mind. Social engineering is not a valid function of this court.

Id. at 510. "Judge-made constitutional law having little or no basis in the Constitution is dangerous and questions the legitimacy of the Court." *Id.* at 512.

Determining for all States such a controversial public policy issue found nowhere in the Constitution would be a mistake. This core area of marriage, the family and appropriate sexual behavior should be left to the States.

CONCLUSION

For the foregoing reasons, the Court should dismiss the writ as improvidently granted. In the alternative, the Court should affirm the judgment of the Court of Appeals of Texas.

Respectfully submitted,

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